

**ASSESSMENT OF PUBLIC COMMENTS FOR RULEMAKING RE 6 NYCRR PARTS
701 AND 703, PROPOSED DECEMBER 3, 2014**

List of Commenters on Proposed Rule:

Argenti, Karen and Westphal, Dart. Bronx Council for Environmental Quality (“BCEQ”)

Atema, Ate. (“Atema”)

Bake, Robert. Brooklyn Bird Club (“Bake”)

Brous, Nancy. NYC Water Trail Association. (“Brous”)

Buchanan, Rob. NYC Water Trail Association (“Buchanan”)

Buxbaum, Diane. Sierra Club NYC Group (“Sierra Club”)

Buxbaum, Diane. (“Buxbaum”)

Citizens Advisory Committee of the NY-NJ Harbor and Estuary Program (“CAC-HEP”)

Coover, Robert. (“Coover”)

Cossman, Dierdre. (“Cossman”)

Craddock, Christopher. (“Craddock, C”)

Craddock, Karen. (“Craddock, K”)

Donnelly, Marlene. Friends and Residents of Greater Gowanus (“FROGG”)

Donnelly, Marlene. Gowanus Canal Superfund Advisory Group and Friends and Residents of the Greater Gowanus (“Donnelly”)

Elkins, Willis. Newtown Creek Alliance (“Newtown Creek Alliance”)

Environmental Entrepreneurs (“E2”)

Gannon, Michael. Douglas Manor Association (“Douglas Manor Association”)

Gene, Royce. (“Gene”)

Gershenbaum, Ira. River Keeper (“Gershenbaum”)

Gruskin, Stuart, The Nature Conservancy (“TNC”)

Hermann, Cody. (“Hermann”)

Kantrowitz, Edith. NYC Friends of Clearwater (“Kantrowitz”)

Kriesberg, Robin. Bronx River Alliance and Storm Water Infrastructure Matters Group (“Kriesberg”)

Langa, Michele. Hackensack Riverkeeper and NY/NJ Baykeeper (“NY-NJ Baykeeper/HRK”)

Natural Resources Defense Council (NRDC) represented by Larry Levine (“NRDC, Larry Levine”)

Melian, Carmen. (“Melian, C”)

Melian, Maria (“Melian, M”)

Molinski, Peter, New York Harbor Foundation (“Molinski”) Mundy, Daniel. Jamaica Bay Ecowatchers (“JamBay Ecowatchers”)

Ng, Randy (Ng)

Orme, Bill. Brooklyn Bridge Park Boathouse (“Orme”)

Ringenary, Mark. Gateway National Recreation Area. (“Ringenary”)

Riverkeeper and Natural Resources Defense Council, Paul Gallay and Larry Levine. (“Riverkeeper/NRDC (Paul Gallay and Larry Levine)”)

Rousakis, John. New York City Dept. of Environmental Protection (“NYCDEP”)

Simon, Akila. Empire Dragon Boat Team head coach (“Simon”)

Steiner, Danny. (“Steiner”)

Tanikama, Shino. NY-NJ Harbor Citizen Advisory Committee (“Tanikama”)

Thurlow, Noelle. (“Thurlow”)

Welch, Julie. S.W.I.M. Coalition (“SWIM Coalition”)

Wilson, Donna. Empire Dragon Boat Team NYC (“Empire Dragon”)

Yuhas, Catherine. (“Yuhas”)

SYNOPSIS OF COMMENTS WITH DEC RESPONSES

Comment 1: Comments in support of the proposed rulemaking

Many comments support all or part of the proposed amendments, and/or generally support having clean waters; some comments suggest that the Department should provide additional protection beyond the proposal.

Specific comments include:

- DEC should fix the problem in Flushing Bay;
- New Yorkers recreate throughout the estuary and the health of all waterways should be given the same weight as that of New York City beaches;
- Many who want to swim in the Hudson River are afraid to, this initiative should help; hopefully at some point it will lessen situations where people emerge from the Hudson River with mustaches due to sewage and other material in the water;
- There should be pathogen levels of control for all waterways in New York City;
- The waters in the New York City area should be clean, swimmable, and healthy for people to submerge their bodies in if they are going to swim and recreate in other ways;
- Everything should be done to make the water as clean and healthy as possible;
- All waters should be swimmable, instead of some being classified for just secondary contact;
- The Hudson River should be as clean as possible for all people that use the water for paddle boarding;
- Human powered boating conveys more than 50,000 people around the estuary annually; these people deserve clean swimmable water;
- The proposed regulations would not be a significant change in procedures for the New York City Department of Environmental Protection (NYCDEP) because of the federal Clean Water Act (CWA) requirement for water to be fishable-swimmable;
- NYCDEP is required to abate combined sewer overflows (CSO) under CSO Order and CSO Long Term Control Plan (LTCP);

- Passing the amendment would greatly enhance public use and enjoyment of the waters such as the Arthur Kill;
- The proposed rule does not provide highest level of protection;
- DEC should go further at this time, to have a rule that fully complies with what the CWA requires, that is to fully protect public health;
- Supports the proposal, but wants to see it strengthened. Primary contact recreation is the right goal, a very simple and clear one that everyone agrees should be reached. People want to be able to swim and fish in their waters, while knowing that sewage will not be discharged. It is a goal that needs to be achieved as soon as possible;
- Supports clean water around New York City. These waters should already be safe for primary contact recreation, but it is understandably a difficult process;
- Waters must be safe for more than just secondary uses or fish survival;
- Designating New York City's waterways as swimmable would be a huge step in making them a functional asset to local residents, but should be paired with a process of community engagement that communicates the problems and solutions of water quality issues directly to the people of New York;
- DEC, US Environmental Protection Agency (EPA), and NYCDEP should do something about cleaning up the waterways;
- DEC needs to set swimmable standards to make other agencies come to life and act;
- Harbors could become more hospitable for marine wildlife and plants;
- There should be stricter regulation of waste and sanitary discharge into local waters. Reducing allowable levels of fecal coliform is important progress to protect the environment, public health, and recreational opportunities;
- Supports actions that limit pathogen levels in Class SD waters, particularly in urban tributaries;
- Application of swimmable water standards is an acknowledgment that in a city with increasing population and no new parkland, people have been increasingly turning to open waters and urban tributaries for recreational needs;
- Enthusiastically supports the proposal, meeting the swimmable goal of the CWA for the Harlem River and the tidal part of the Bronx River. DEC should enforce this rule change. Appreciates the timeliness of the proposal as we await New York City's CSO LTCP for our rivers; expects DEC to enforce this rule change;

- Enthusiastically supports the proposed amendment to set the water quality goal of all New York City waters being swimmable, which would make the Bronx River safe for primary contact;
- There has been a “remarkable resurgence” of the Bronx River since the 1970s when it was an abandoned dumping ground. Today more than 5,000 recreational boaters enjoy the River each year. Seven boat launches have been opened and over 9,500 students have touched or been touched by the River. The River has been made an outdoor classroom for hundreds of students every year by over 2,300 educators. It is a testament to the progress when in 2012 the National Park Service designated the Bronx River as a national water trail. Building on the great progress, DEC is urged to make important regulatory changes to protect the many citizens who depend on a clean and healthy river so they too can safely enjoy all the recreational and educational opportunities it offers;
- A member of the Guardians of Flushing Bay, a group of Dragon boaters, is very concerned about the environment and paddlers’ health risks due to the gradual destruction and abuse of the ecosystem resulting from New York’s industrial growth over the decades. Flushing Bay is the only protected bay in the area fit for human powered water sports and other activities that have incidental direct contact with the water. The water quality should be raised to a level where it is swimmable where people have primary contact with the water so people are not in fear of being harmed. DEC should make changes so that paddlers are safe;
- Proposed change is a socially responsible directive;
- Supports the imposition of more protective water quality criteria for Class I and SD waters;
- The most important issue is the application of the proposal to Alley Creek at the head of Little Neck Bay. Douglas Manor Association maintains a bathing beach on the bay and residents regularly kayak on Alley Creek. The proposal will bring Little Neck Bay closer to the CWA’s swimmable mandate;
- In the longer-term, DEC should examine the feasibility and lawfulness of regulating all five classifications of water under even stricter requirements than required by the CWA;
- DEC has authority for this proposed action; legal validation/authority is contained in section 4, Article XIV of the New York State Constitution;
- The proposed action is merely bringing the state legislation into consistency with federal law). New York could be at risk for a civil action for its noncompliance for over three decades if DEC does not pass the amendment and an aggrieved party can prove New York City’s navigable waters can be brought up to recreational standards. For DEC to take no action on the proposed amendment would allow the EPA to exercise its authority to regulate state waters, potentially creating an inefficient bifurcated regulatory system

that adversely impacts the population that both agencies are supposed to protect. DEC is urged to approve the amendment but to also understand the urgency in guiding the necessary changes by affected government and local businesses as soon as possible.

- DEC's rationale that there should be no consideration of additional costs for local government or regulated parties to burden because of existing rules and requirements under the CWA, LTCP policy and New York City's Modified CSO Order is correct. The amendment merely meets the consistency requirement between the federal, local and now state regulations and allows the state to better coordinate change.
- Implementing stronger standards now will push quicker and more efficient cleanup of water bodies and such standards will also provide incentive for New York City to establish higher standards for its runoff and raw sewage management plans.
- Just as the Hudson River was cleaned up, other waters need to undergo the same process. During the 1970's, the Hudson River was "so bad not even the aquatic wood worms would live there and the wooden piers were preserved." (Melian, C., 2). It is possible to get the waters cleaned up, we just need the government and everybody else to do something about it.

Commenters: Atema; Bake; BCEQ; Brous; Buchanan; Buxbaum; CAC – HEP; Coover; Craddock, C.; Craddock, K; Donnelly; Douglas Manor Association; Empire Dragon; FROGG; Gene; Gershenbaum; Herrmann; Kantrowitz; Kriesberg; Melian, C.; Melian, M.; Newtown Creek Alliance; Ng; NRDC, Larry Levine; NY-NJ Baykeeper/HRK; Orme; Ringenary; Riverkeeper/NRDC (Paul Gallay and Larry Levine); SWIM Coalition; Simon; Tanikama; Thurlow; TNC; Yuhas

Response to Comment 1: The New York State Department of Environmental Conservation (DEC; the Department) acknowledges and appreciates these comments in support of the rulemaking.

In response to the comments that urge DEC to consider additional measures above and beyond the current proposal, DEC will take these suggestions into consideration for future rulemaking. This rulemaking provides a large step forward by requiring the waters to meet the swimmable goal of the CWA. Additional actions are under development, including the federally mandated statewide triennial review rulemaking for water quality standards.

Comments about the fishable goal of the CWA are addressed in DEC's response to comment 38.

Comment 2: Support for upgraded standards only in certain waters

The DEC should upgrade water quality standards in the Hudson River (Manhattan) and Upper New York Bay to include primary contact fecal coliform water quality criteria during the May – October recreation season. NYCDEP would support efforts by DEC to incrementally improve water quality in other current Class I and Class SD water bodies above the existing secondary

contact standard where appropriate. For example, in each of the four CSO LTCPs submitted by NYCDEP in 2014, NYCDEP proposed site specific targets for fecal coliform that would be more stringent than the current Class I fecal coliform standards.

Commenter: NYCDEP

Response to Comment 2:

DEC appreciates New York City's support for upgrading water quality standards in certain waters. However, the CWA and federal regulations in 40 CFR 131.10 require that all waters, where attainable, be suitable for swimming. This rulemaking ensures that standards are in place to achieve that goal.

Comment 3: Sampling and testing of waters

Data collection/testing standards should include or be based on near-shore testing that reflects quality of waters to which recreational users are exposed. DEC should require that water samples be taken from near-shore areas where people swim, kayak, paddle, or come into close contact with the water through other recreational uses, rather than near the shore where sewage discharges have been diluted further into the center of a stream, or in the middle where there is minimum contact.

New York City's current water quality monitoring, upon which DEC relies to determine compliance with water quality standards, typically is located in the middle of a river rather than near the shore. The regulations should be clear as to how compliance is measured. The cleanup to support primary contact is an integral part of water quality.

The NYCDEP harbor survey, while a great thing, is not an accurate reflection of harbor water quality for recreation users. DEC will need to expand the data points. Citizen monitoring results for enterococcus from near the shore (Stuyvesant at 23rd Street) with 35-40% not meeting the swimmable requirement, are contrasted to the middle of the East River (at East 23rd Street) where harbor survey results which showed a result of less than 30% (i.e., swimmable).

The way the proposed rules have been written will not mandate much change in Class SD waters because of how testing is taking place in the so-called center waterways. People who actually come in contact with the water closer to the shore should be protected.

Testing should be conducted where outflows and illegal discharges happen. Following a 2011 fire at the NYC North River water pollution control plant, in which water quality in the shipping channel of the Hudson River showed no effect of sewage leaks; however near shore waters, where most primary contact recreation happens, were shown to be highly contaminated. Monitoring should ensure public protection. Special testing should be adopted for CSO areas receiving high levels of sewage flow to include testing for wider range of problematic bacteria.

The Water Trail Association operates an ambitious water quality testing program in partnership with The River Project, using volunteer samplers to test for enterococcus at more than 30 launch sites around the harbor. The idea is to create a reliable up-to-date and easy to interpret database that harbor boaters can use to predict likely water quality at their preferred launch site. This is aimed at more than 40 human powered boat put-ins for enterococcus each summer, once a week for 20 weeks. DEP only has two test sites in the middle stretch of the East River, 23rd Street and Hell's Gate, mid-current, mid-channel, and the results are different.

If we call the water swimmable, it changes the game for a lot of people. If we call the water swimmable, people will expect it to be swimmable, and will want to know. The Harbor Survey is not an accurate reflection of harbor water quality, so, how will water quality be measured? Data points will need to be expanded.

Commenters: Brous; Buchanan; Buxbaum; CAC-HEP; Coover; Donnelly; E2; Empire Dragon; FROGG; Kantrowitz; Kriesberg; NRDC (Larry Levine); Orme; Sierra Club; Simon; SWIM Coalition

Response to Comment 3:

Water quality standards apply to the entirety of a water body, but do not generally contain specific sampling locations or monitoring frequency requirements. For water quality purposes, it is not possible or scientifically necessary to monitor all locations at all times. Monitoring is done through a combination of sampling locations and models, including some near shore locations, to provide the best information available on water quality. DEC's objective is to determine the overall condition of the water body. This approach is consistent with the Department's commitment to rigorous Quality Assurance (QA) practices in all its environmental programs and its associated goal "to ensure that all data produced is precise, unbiased, representative, complete, comparable, and sufficiently sensitive [and]... to document all data collection and decision making processes to ensure all data are reproducible and defensible."* In some waters – specifically, New York City waters – modeling allows for a more location- and frequency-specific, but calculated, assessment of the water body.

* (from the NYSDEC Quality Assurance Management Plan for the Division of Water, April 2, 2014)

New York City has approximately 600 miles of coastline and over 200 square miles of surface waters. These waters receive discharges from 14 wastewater treatment plants, over 400 combined sewer outfalls, and approximately 2,000 separate storm water outfalls as well as direct runoff from waterfront areas. As a result of these numerous discharges spread over a wide area,

the water quality of New York City's waters varies considerably on a spatial and temporal basis. Ideally, water quality sampling should be conducted at both near-shore and mid-water locations; however, as a practical matter, given limited fiscal and staff resources, it is not possible to sample at every location where primary contact recreation may occur or where there is a discharge. The water quality of New York City's waters has historically been assessed using data from the City's Harbor Survey Monitoring Program, in conjunction with water quality models developed by the City. DEC does not have a water quality monitoring program to independently assess the water quality, and it is DEC's position that the Harbor Survey Monitoring Program is adequate (Note: the Sentinel Monitoring program required under New York City's State Pollutant Discharge Elimination System (SPDES) permits to identify illicit dry weather discharges using the same sampling locations as the Harbor Survey Monitoring Program). DEC will continue to rely on the Harbor Survey Monitoring Program data and associated water quality models to assess water quality of all water bodies and predict compliance with water quality standards for both near shore and open waters. The DEC will not require extensive near-shore sampling. The Harbor Survey Monitoring Program currently analyzes water samples for fecal coliform. DEC supports the continued use of fecal coliform indicator for assessing public health risks, until such time that DEC revises the regulations to switch indicators.

NYCDEP does sample for enterococcus and fecal coliform under the Harbor Survey. Post construction monitoring under LTCPs will supplement Harbor Survey sampling by adding locations as necessary to establish the effectiveness of the control measures.

Comment 4: Monitoring, attainment, and notification

For the public to have a better understanding of public agencies data, DEC should regulate agencies to improve their data presentation, notification and monitoring efforts. It is almost impossible for the public to understand the public agencies' monitoring efforts as well as notification efforts, as neither are user-friendly. If we go to swimmable water designations, it has to be reflected in better monitoring and more interpretable results. NYCDEP's data and result pages on their website are great, but the public cannot understand it.

What indicators are being monitored for, what threshold levels will be used to protect public health, how frequently will waters be examined, and how will exceedences be reported to the public? How will monitoring be accomplished? How will standards be monitored once water quality conditions are met? What are the spatial and temporal designs for validating attainment of water quality standards? How will attainment of uses be verified and approved? How will attainment of swimmable waters be accomplished and demonstrated?

Commenters: Buchanan; Orme; Ringenary

Response to Comment 4:

Monitoring and reporting for protection of public health will continue to be the role of the state and local health departments.

The best means of measuring spatial and temporal conditions is through water quality modeling. This effort has been extensive in New York City waters. The requirements for New York City include verification of modeling results with post-construction monitoring.

See DEC's response to Comment 3 regarding monitoring and assessment of water quality. Data from the City's Harbor Survey Monitoring Program is available from the City's website:

Harbor Survey Sampling Data:

http://www.nyc.gov/html/dep/html/harborwater/harbor_water_sampling_results.shtml

Summary reports of the Harbor Survey Monitoring data are available as well:

New York Harbor Water Quality Report:

http://www.nyc.gov/html/dep/html/harborwater/harborwater_quality_survey.shtml

With respect to notification, DEC has recently established a public notification program under the Sewage Pollution Right to Know law. Additional information is available at

<http://www.dec.ny.gov/chemical/90315.html>

Comment 5: Standard should be for enterococcus instead of coliform

DEC should use enterococcus as the standard instead of total and fecal coliform. Some commenters specifically tied enterococcus to the EPA 2012 Recreational Water Quality Criteria (RWQC); others mentioned enterococcus more broadly. Specific points made include:

- Enterococcus standards are more health protective, modern, and scientifically supported than the scientifically outdated fecal coliform standards;
- Enterococcus is a better indicator of human health outcomes for a number of reasons, including its ability to survive in salt waters and that it is more specific to humans than other bacterial groups. Because the waters around New York City are salt or brackish, it is more efficient to test for enterococcus than fecal coliform. Given that the primary concern for recreational water use is human health and safety, it is best to test for bacteria that have the most significant link to human health outcomes;
- While the EPA criteria should be stronger, they are based on more recent science than DEC's current standard, and would provide a better level of protection for New Yorkers
- DEC should use the most modern scientific criteria and standards to protect and test for water quality for swimming;
- Some people test waters using enterococcus which is also used to test swimming beaches; the same standards must be used for "their" waters as for the beaches;

- Enterococcus as a pathogen indicator is understandable for the public. New York City uses this indicator when the City allows the public to go swimming at Staten Island or Coney Island. Every citizen test group uses this indicator for water monitoring;
- DEC has stated that they envision this as a multiple part thing, starting with coliform and switching to enterococcus in the future. However, everything changes when it is said the harbor is swimmable, and DEC should be ready to explain to people what that means. Without the enterococcus standard in place, it will require the public to translate from a language they don't understand to another language that they don't understand. To avoid confusion in the future, it is prudent to do the switchover to enterococcus as the indicator now, rather than next year or the year after;
- If DEC continues with its phased approach (of adopting total coliform and fecal coliform in the current proposed rule and replacing these standards with enterococcus in the statewide triennial rulemaking) NYC would have to conduct its analysis twice. Also, the switch to enterococcus should be done now for public outreach and communication given that current beach testing is for enterococcus and should be consistent;
- DEC must establish criteria for Class I and Class SD waters that are based on the best science and are at least as protective as EPA's RWQC. DEC has recognized that it owes such legal protection to waters that are currently designated for primary contact use. To comply with the law and protect public health, DEC must apply the same criteria to these waters;
- All coastal waters in the state that are currently designated for swimmable use are subject to an enterococcus-based standard;
- The CWA requires DEC to update criteria to enterococci by later this year;
- Since DEC already uses enterococcus bacteria levels to monitor existing primary contact designated water bodies within the state, it would be easy to use the same test for these water bodies as well. If the Department amends the proposal to alter water quality standards and use designation, all of the covered water bodies in New York State would then be subject to uniform standards.

Commenters: BCEQ; Brous; Buchanan; CAC-HEP; E2; Empire Dragon; JamBay Ecowatchers; Kantrowitz; Kriesberg; Newtown Creek Alliance; NRDC, Larry Levine; NY-NJ Baykeeper/HRK; Orme; Riverkeeper/NRDC (Paul Gallay and Larry Levine); Sierra Club; SWIM Coalition; Tanikama; TNC

Response to Comment 5: With the adoption of this rulemaking, the Department is requiring that Class SD and Class I waters meet the CWA swimmable goal. This is necessary to bring these waters into compliance with the CWA. DEC will consider revising its water quality standards for pathogens, in light of EPA's 2012 RWQC, as part of New York State's normal triennial

review of its standards. This will include a full review of the appropriateness of using an enterococcus standard, and various ways to measure that standard.

It is DEC's position that it would be more appropriate to make changes in pathogen indicators for all classes of water at one time. This would avoid a patchwork approach of having different recreational water quality indicators in adjacent waters.

Comment 6: Federal Standards for Coastal Recreation Waters

DEC should revise the draft regulations to ensure that the EPA's Beaches Environmental Assessment and Coastal Health (BEACH) Act standards apply to these waters, including Flushing Bay.

DEC should amend the use designation to primary contact, triggering EPA's stricter RWQC standard and switch to enterococcus based standards.

Commenters: Coover; Empire Dragon; Kantrowitz; NY-NJ Baykeeper/HRK

Response to Comment 6:

This comment appears to be referring to the "Water Quality Standards for Coastal and Great Lakes Recreation Waters; Final Rule" (Vol. 69, No. 220 / Tuesday, November 16, 2004, pp. 67218-67243 (69 FR 67218) ("2004 federal BEACH Act Rule") that applies to coastal recreation waters. The 2000 federal BEACH Act also added section 502(21)(A) to the Clean Water Act, which defines "coastal recreation waters" as "(i) the Great Lakes; and (ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities." Section 502(21)(B) explicitly excludes from the definition of coastal recreation waters "inland waters" or "waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea." With the adoption of this rulemaking, Class I waters that are coastal recreation waters as defined in EPA's 2004 federal BEACH Act Rule are now subject to the enterococcus standards promulgated in 2004 by EPA for coastal recreation waters.

By adding the requirement that water quality of Class I and SD waters must be suitable for primary contact recreation, any Class I or Class SD waters that are coastal recreation waters would be subject to the 2004 federal BEACH Act. However, Flushing Bay, although Class I, is not considered a coastal recreation water due to its location which is covered under the Beach Act exemptions (it is upstream of the mouth of the East River). Thus, the 2004 federal BEACH Act Rule would not apply to it. As noted in the response to Comment 5 above, as part of New York State's normal triennial review of its standards, consideration will be given to revising the Department's water quality standards with respect to pathogen indicators (specifically enterococcus) for waters of New York State, including Flushing Bay, under the national EPA guidance.

Comment 7: Water quality is poor and unacceptable

The water quality is poor and unacceptable. Specifics points included:

- Waters should be jewel in state's crown instead of a toilet;
- Newtown Creek has serious issues with pollution and poor water quality;
- CSO overflows adversely affect water quality and must be fixed;
- CSO overflows are part of an antiquated sewer system that can no longer process the high degree of rainwater runoff caused by development and asphalted lands which do not allow the ground to absorb the rainwater;
- Flushing Bay water quality is terrible due to CSOs;
- Water has been observed pouring out of the CSO at Flushing Bay; it smells horrible; at times a cloudy discharge is visible in the water;
- A Dragon boater fears getting sick or an infection as many of her teammates have in the past. She tries to cover herself head to toe with as many layers as possible;
- At Flushing Bay there is a sewage deposit of 1.1 million gallons. Especially during a storm the millions of sewage that is dumped becomes more problematic because of its high levels of bacteria, such as E. coli. Most of the time, Flushing Bay is the only home for dragon boating; this event leads to many people getting sick and some having severe cases that result in visits to the emergency room. There are two municipal sanitation areas in their community, and two cement concrete treatment plants. At times one can tell that the municipal waste, the liquids come through the sewage and create the slick and smell and engage bacteria that are in the waters;
- It is a disgrace that raw sewage is regularly being flushed into the waters of the richest city in the richest country in the world. This is not a third world country, the know-how and money is available to fix the problem;
- The water is basically filthy; part of it is industrial waste, but most of it is from human sewage from the CSOs and it's due to faulty engineering. This can be fixed, it takes time, money and effort, but it can be done;
- Green initiatives and the Billion Oyster project are great, but not enough;
- Waterways in the Hudson/Raritan Bay Delta are one of the natural marvels of the Eastern Seaboard. Water quality is not up to acceptable levels in many areas; much of this is due to CSO overflows, which can and needs to be fixed;

- The waterfront of Flushing Bay is unappealing due to poor water quality. There has never been an effort from the government to clean the waterways or make it more hospitable to recreational use. Residents are totally unaware of the reasons why the water is polluted, e.g., CSOs and industrial dumping;
- The smell of NYC waters keeps local people away;
- NYC undoubtedly has some of the nation's most polluted channels of water;
- The National Park Service has a biologist at Gateway National Recreation Area testing the water; Jamaica Bay is very bad. It is not clear what indicators DEC looks at in the background, but people can get a false sense of security by passing measures;
- Flushing Bay does not meet swimmable standards;
- There is a lot of fecal matter in Flushing Bay during high and low tide. The cancer survivors of the Empire Dragon Boat Team have many concerns about their health. The head coach and other members of the team have skin infections because of the contact with the poor quality water;
- CSO discharges impact water quality result in increased pathogens and nutrients;
- Fecal coliform is detrimental to human health and would violate fishable-swimmable classification;
- Fecal coliform prevents contact recreation such as swimming, and the consumption of shellfish. Increased nutrients can lead to algal blooms and potentially eutrophication of waters resulting in increased biodiversity in the estuary and reduced harvest for recreational and commercial fishermen;
- Some people leave New York City to recreate and to use cleaner waters elsewhere, but not everyone has the means to do so. People who recreate in New York City waters risk skin rashes, bacterial infections, or more serious health related issues as a result of fecal contamination;
- Raw sewage and runoff contaminates waters surrounding New York City after it rains, making contact unsafe much of the year;
- Raw sewage enters due to CSOs. Rain washes contaminants including pesticides, pet waste and fertilizers into drains and water bodies, which can cause astronomic levels of human pathogens in New York State waters posing an extreme threat to human health;

- The presence of antibiotic-resistant bacteria in New York City waters is a concern. New York City has the highest rate of such infections, per the Centers for Disease Control and Prevention (CDC), and hospitals use the common sewer system.
- More than 6,000 people participated in free public kayaking programs based in Brooklyn Bridge Park last summer. Programs have often been suspended on short notice due to concerns about water quality in the Park embayments following heavy rains; such concerns were proved justified via subsequent testing results.
- During Hurricane Sandy, a woman found herself wandering in four feet of water in the streets of New York City, with stitches, having had open surgery days earlier.
- Students are unable to get out on the water to kayak in Hoboken in the river

Commenters: Cossman; Craddock, C; Craddock, K; Donnely; Empire Dragon; FROGG; Gene; Gershenbaum; Herrmann; NY-NJ Baykeeper/HRK; Melian, C; Melian, M; Newtown Creek Alliance; Ng; Orme; Ringenary; Simon; Yuhas

Response to Comment 7:

The Department agrees that there are waters in New York City that are in need of improvement to meet the swimmable goal of the CWA. However it is also important to acknowledge the improvements that have been made over the past few decades. Figure 1 in Appendix A illustrates the changes that have occurred in the ambient concentrations of fecal coliform in New York City waters from 1985 to 2013. Overall, these changes are a result of substantial investments in construction of wastewater treatment plants and abatement projects for combined sewer overflows over decades. Notwithstanding these improvements, New York City is under enforcement orders to continue to upgrade their treatment plants and Combined Sewer Overflows, as well as develop LTCPs to identify and select additional measures to address the impacts of combined sewer overflows to meet water quality standards. Please see DEC's Response to Comment 17 for a discussion of stormwater sources of impairment under its MS4 permits.

Comment 8: Opposes chemical disinfection

EPA's proposal to put "disinfectant" down the sewers to neutralize the sewage is a "crackpot idea"; the last thing we need is more chemicals in the water. The Empire Dragon Boat Team is made up of cancer survivors and they do not need more chemicals in the water. What is needed is engineering solutions, which can be done.

Commenters: Melian, C; Melian, M

Response to Comment 8:

The water quality standards do not require a specific form of wastewater treatment; that information is specified as part of the permitting process. However, DEC notes that disinfection is a major component of modern wastewater and water treatment processes to ensure that levels of pathogens discharged do not exceed water quality standards for protecting human health. Overall, the practice of disinfection of both drinking water and wastewater effluent has resulted in significant public health improvements over the past 100 years. However, as with any treatment process, NYS has regulatory authority to ensure it is done in a manner to protect public health and the environment.

Comment 9: Additional CSO storage capacity must be built

More holding tanks must be built, and the areas of the New York City sewer system that cannot handle the runoff need to be re-engineered. It is only a matter of money and this is what we pay our taxes towards. Infrastructure needs to be maintained and improved.

Commenter: Melian, C

Response to Comment 9:

New York City has previously invested approximately \$1.8 billion in CSO projects and is under an enforcement order to develop LTCPs to identify and select additional measures to address the impacts of combined sewer overflows. It is expected that these projects will lead to several billion dollars more in improvements. In addition, the City's SPDES permit includes requirements for optimizing the operation of the wastewater treatment and collection systems.

Comment 10: Reclassification of Flushing Bay and Gowanus Canal

Flushing Bay should be reclassified as swimmable. The Empire Dragon Boat Team members are getting splashed, flipped, and people actually have contact with the water. Dragon boat paddling in the U.S. is a fast growing sport. The dragon boating community has come together and formed Guardians of the Bay. The community is talking about oyster testing, water quality testing, and trying to do their part. There is no other place than Flushing Bay for Dragon boaters to paddle or call home; DEC should change the designation for Flushing Bay.

In 2012, the Gowanus Canal Superfund Advisory Group had resolved and notified NYCDEP and DEC that water of the Gowanus Canal should be reclassified. The water should be reclassified from the current industrial standard designated Class SD – which mandates a minimal level of

dissolved oxygen to be maintained in the water but places no limits of the level of pathogens in the waterway – to protecting its current recreational use. Protecting its recreational use includes contact recreation for families with children and imposes limits on pathogenic levels of coliform and bacteria necessary to protect people from disease due by contacting the water while recreating on the Canal.

Any change New York City makes that places new institutional control on the level of pathogens allowed in Class I and SD waters is a positive step. However, the rulemaking does not affect the use designation for water classification. The proposed rule should not be a substitute for reclassification based on actual public use of the public waters.

Commenters: Buxbaum; Donnely; Melian, C.; Simon

Response to Comment 10:

With the adoption of this rulemaking, the quality of the waters in Flushing Bay and Gowanus Canal (and in all other Class I and Class SD waters) must be suitable for swimming, which would protect primary contact recreation. Reclassification of individual water bodies is not necessary to achieve this objective.

Comment 11: Primary contact recreation should be a best (designated) use, not just a water quality suitability requirement

Waters should be designated, with a best usage assigned, for primary contact, rather than merely requiring water quality to be suitable for swimming. The language should be changed to say that primary contact recreation is a best usage of Class I and Class SD waters, designated uses and water quality criteria should both be included.

Standards should apply equitably and the goal should be swimmable waters throughout the region. The goal of fishable-swimmable may not be achieved absent this use designation. Several related, specific comments are shown below:

- The proposed regulations are not protective of the public's current use of the waters;
- The designated uses of the Bronx River should be changed to primary contact to support a variety of recreational and educational activities already taking place on the river;
- Swimmable water throughout the harbor estuary is the ultimate goal and nothing less than true primary contact protection now will realize that standard;
- The rule as proposed does not provide the highest level of protection to ensure that the water bodies covered actually meet the fishable-swimmable goals of the CWA. Because

the rule does not amend the designated uses, the goal of fishable-swimmable status may never occur until these uses are changed. DEC should adopt the strictest use designation;

- At the NY-NJ Harbor and Estuary Program CAC committee meeting on Jan 16, the DEC representative stated that the amendments are intended as changes to the designated uses (best usage). Further, EPA Region 2 staff interpreted the proposal the same way;
- DEC's failure to designate primary contact recreation as a use fails to assess or designate uses that thus fails to fully discharge the DEC's non-discretionary duty to issue water quality standards addressing all components (use, criteria, and anti-degradation policy) DEC is required by federal law to designate the subject waters for primary contact recreation or to conduct a Use Attainability Analysis (UAA) to justify its refusal to do so. The proposed amendment fails to designate primary contact recreation as a best usage and thus fails to fully discharge DEC's non-discretionary duties under state law. ECL §17-0301 provides that DEC must group the designated waters into classes, and adopt and assign standards of quality and purity for each classification. Inclusion of a standard for primary contact recreation ("suitable for") is not a substitute for a best use;
- Changing the use designation is a critical point of law because doing so will trigger the application of federal BEACH Act standards for all coastal recreational waters, and that is defined for primary contact use. Thus, it is really important that DEC makes very clear in the language of the regulation that they are in fact changing designated use, and not merely saying there is something else to use for water quality issues;
- Some water bodies will not fully allow for primary contact recreation for reasons unrelated to water quality and support waterfront and waterway uses that meet the needs of the community, city, and region. However, regardless of whether a waterway is physically safe enough for swimming and boating to regularly occur, the water should be clean enough to do so. DEC's proposed regulation appears to adopt this perspective, but as drafted it fails to actually protect water quality because it does not adopt primary contact as a designated use;
- Secondary contact designation is not strict enough to achieve the swimmable goal, nor are standards strong enough to protect for accidental ingestion or full contact. Secondary contact designation does not ensure that recreational users are safe from rashes, infections, and more serious health risks due to lower quality criteria. An upgrade to primary contact designation would ensure that these water bodies are swimmable and safe for all types of recreational contact;
- The manner in which the proposal is formulated, avoiding the issue of water "uses" in Class SD and I waters, allows for legal maneuvering for municipalities to proceed as usual without making needed changes to insure public safety in these waters;

- The proposal is changing water quality standards without really explicitly changing the designated use. There have been incidents of infections, rashes and other things just from Dragon boaters paddling and getting splashed. Thus, it is important to amend the designated use to primary contact recreation, not just water quality criteria;

Commenters: Brous; CAC-HEP; Coover; Cossman; E2; Empire Dragon; FROGG; JamBay Ecowatchers; Kantrowitz; Kriesberg; NRDC, Larry Levine; NY-NJ Baykeeper/HRK; Orme; Riverkeeper/NRDC (Paul Gallay and Larry Levine); Sierra Club; SWIM Coalition; Tanikama

Response to Comment 11:

It is not necessary to adopt a “best use” of primary contact recreation in order to protect the waters for that use. Requiring water quality to be suitable for primary contact recreation provides equivalent protection as would designating primary contact recreation as a best use.

For 30 years, the Department has required the quality of Class SC, C, and D waters to be suitable for swimming, which carries the same protection from pathogens as for waters for which the best use is swimming. This approach was promulgated in New York State’s regulations in 1985 and was approved by EPA, to protect these waters for primary contact recreation. Extending this same requirement to Class I and Class SD waters will provide similar and complete protection for this use, and will meet the requirements of the CWA and 40 CFR Part 131.10 for waters to be swimmable.

Further, it is not necessary to have primary contact recreation added as “best use” or “best usage” in order for the 2004 promulgated federal enterococcus standards for coastal recreation waters to apply. See the DEC response to Comment 6 for additional discussion of the 2004 federal BEACH Act Rule standards.

Comments about the fishable goal of the CWA are addressed in DEC’s response to Comment 38.

Comment 12: Current Class I and SD standards insufficient to achieve swimmable waters

Current water quality standards for Class I (boating and fishing standard) and SD (fish survival standard) waters are insufficient to achieve the CWA goal of swimmable waters. The “swimmable” standard as stated in the CWA §101, requires all waters to be “fishable and swimmable” by “eliminating all pollutant discharges into waters of the U.S.” Support for primary contact recreation is one of the key purposes of the CWA. To the extent that DEC’s proposal fails to require the strictest water quality standards available, DEC has failed to aspire to the goal the Act hoped to accomplish by 1985.

Commenter: NY-NJ Baykeeper/HRK

Response to Comment 12:

The CWA requires that waters, where attainable, meet the swimmable goal by July 1, 1983. Further, the Department agrees that existing New York State standards for Class I and Class SD waters are insufficient to achieve the swimmable goal. With the adoption of this rulemaking, New York State regulations require that Class I and Class SD meet the swimmable goal of the CWA.

Comments about the fishable goal of the CWA are addressed in DEC's response to Comment 38.

Comment 13: Human-powered boating is primary contact recreation

Human-powered boating is primary contact recreation; it results in the same risk of direct contact with the water (including unclean water) as does swimming. Human-powered boating includes kayaking, canoeing, and dragon boating. Thus, DEC must change the designated use to primary contact to protect the existing users of the waters. With 20 paddlers per boat, dragon boating is a human powered active sport that involves extensive contact with the waters; thus people are exposed to the same risks of polluted water as swimming.

In many other jurisdictions including states and EPA regions consider team paddling, even power boating should be primary contact recreations because participants do get wet. It's a legal matter as well; DEC in its regulation should be treating kayaking and boat paddling as primary contact activity.

The only place the Empire Dragon boat team (cancer survivors) can practice is Flushing Bay, where water purity levels are much lower than they should be. A cancer survivor is in contact with carcinogenic substances floating around in Flushing Bay despite being covered nearly head-to-toe for Dragon Boat paddling. Although it may be assumed that dragon boaters are above water and only put their hands in the water, this is not the case; paddlers have direct contact with the water. Dragon boaters get splashed all the time and sometimes accidentally swallow it, which is not a pleasant experience.

With paddle boarding, people fall off all the time and children jump off into the water; therefore, people are all in the water.

Commenters: CAC-HEP; Craddock, C; Craddock, K; E2; Empire Dragon; Kantrowitz; Kriesberg; NRDC, Larry Levine; Orme; Riverkeeper/NRDC (Paul Gallay and Larry Levine); SWIM Coalition; Thurlow

Response to Comment 13:

With the adoption of this rulemaking, the quality of all Class I and Class SD waters must be suitable for primary contact recreation.

Comment 14: Suitability/“Other factors may limit” language overly vague and creates loophole

The terminology of “water quality shall be suitable for primary contact recreation, although other factors may limit the use” in section 701.13 is overly broad and vague and should be limited; it could render the intent of the new regulations to protect water quality to be meaningless. The “other factors” clause presents a loophole. DEC has always lawfully interpreted “other factors” to mean activities such as barge traffic precluding safe swimming, or naturally occurring conditions such as shallow depth or rapids. “Other factors” could be argued to include something like a CSO event, where pollution limits a waterways utility for swimming. DEC needs to clarify in the final regulations that “other factors” be limited to non-pollutant and non-pollution factors.

Commenters: Empire Dragon; Riverkeeper/NRDC (Paul Gallay and Larry Levine)

Response to Comment 14:

“Other factors” refer to physical and/or suitability factors that are not related to water quality. Examples of such factors include swift water, water depth, rocks, waterfalls, heavy shipping traffic, etc. Water quality must be suitable for primary contact recreation regardless of whether or not other factors limit the use for that purpose.

The “other factors” language already applies to Class SC, Class C, and Class D waters, and with the adoption of this rulemaking, will apply to Class I and Class SD waters as well. This language is clear that other factors refer to factors other than water quality, given that it says “water quality shall be suitable...but other factors may limit the use...” However, in a triennial rulemaking, DEC will consider whether additional wording could be added to provide even greater clarity.

Comment 15: Effect on New York City CSO

How will the proposed changes affect ongoing water quality improvement programs? Specifically, how will New York City be required to reduce discharges of untreated sewage/pollution? Untreated sewage of CSOs is a concern because it is a primary source of pollution in Flushing Bay and other Class SD and Class I waters.

Commenter: Empire Dragon

Response to Comment 15:

New York City is required to develop water quality programs that will meet any adopted water quality standards. With respect to CSOs, New York City is under an enforcement order to develop LTCPs to identify and select additional measures to address the impact of CSOs. As part of the development of the LTCPs, the City must evaluate attainment with primary contact

recreation standards and conduct post-construction monitoring to verify the actual water quality improvements achieved over the long-term.

Comment 16: Existing uses and preventing removal of use via UAA

Certain water bodies such as Newtown Creek, Gowanus Canal, and Jamaica Bay including its tributaries and tidal creeks, are already used for recreational purposes. The proposed amendment should not lead to a UAA, which would not result in meeting the new standards.

Commenters: CAC-HEP; JamBay Ecowatchers; Newtown Creek Alliance; Sierra Club;

Response to Comment 16:

A UAA for a water body is authorized by the CWA and governed by federal regulations at 40 CFR 131.10(g). For EPA to approve a UAA, at least one of the six factors set forth in 40 CFR 131.10(g) would have to be met. This rulemaking is not intended to alter in any way the existing provisions by which a UAA may be conducted.

EPA's regulations at 40 C.F.R. Part 131 interpret and implement the provisions of Sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards protect section 101(a)(2) uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. Unless the state rebuts this presumption, a default designation of the section 101(a)(2) uses applies. Where a state believes that a use specified in section 101(a)(2) is not attainable and wishes to remove or subcategorize this use, the state is required to demonstrate that the use is not attainable based on one or more of the factors included in 40 C.F.R. Part 131.10(g) through the completion and submission to EPA of a UAA. In addition the State must show that the change in use will not result in removing an existing use. Any such change is subject to a public participation process.

Comment 17: Application of new coliform standards/related proposed regulations, to municipal stormwater and combined sewer overflow programs

Issues were raised related to how the new primary contact recreation standards would be implemented via Municipal Separate Storm Sewer System (MS4) permits, and CSO, and LTCPs for New York City. The new criteria must be integrated into New York City's LTCPs to require the City to increase reduction of untreated sewage.

Specific concerns expressed include:

- How will the new water quality standard be incorporated into the MS4 Permit, which is believed to not include any specific pollutant load reductions?

The Bronx River LTCP process began in February, with scheduled completion in June 2015. The water quality changes proposed by DEC should be incorporated into the planning process to ensure that the final plan achieves water quality standards that protect the public and support existing uses of the River.

- How the proposed amendment will affect the CSO LTCPs that have been either approved or submitted to the DEC? How will the proposal affect the yet-to-be-finalized MS4 permit for the City? Meeting the primary contact recreation criteria would be difficult in some water bodies.
- DEC should clearly explain in the regulations or accompanying explanatory guidance that the changes to the regulations will apply to the ongoing water quality improvement programs, such as the New York City LTCPs (including those that are currently under development and those that were previously approved by DEC) and the Storm Water Management Plan that New York City's new MS4 permit will require. This is critically important since the primary source of human pathogens in the Class SD and Class I waters are untreated sewage from the CSOs and polluted runoff. New water quality standards must, as a matter of law, be applied to these and all other discharges. Measures should be taken to ensure that these new criteria are integrated into the city's sewage overflow reduction plans (LTCPs currently under development) to actually require the city to increase reduction of untreated sewage discharge. This is essential because the primary cause of pollution in many of Class SD and I waters is untreated sewage from CSOs.
- How will the proposed change be integrated into the ongoing water quality improvement program, particularly the long term control planning process to the CSO and nonpoint source in the City? Presumably, these standards will be incorporated into the planning process but it should be made clear how the City will amend the LTCP submitted, or if they are going to be resubmitting those plans. Measures should be taken to make sure that the proposed criteria are integrated into the City's sewage overflow reduction plans.

Commenters: CAC-HEP; Coover; Kantrowitz; Kriesberg; Newtown Creek Alliance; SWIM Coalition; Tanikama

Response to Comment 17:

NYC is required to meet DEC's water quality standards, including those adopted in this rule making, in developing the LTCPs for the CSO program and for the NYC MS4 permit. The LTCPs submitted to date have evaluated attainment against primary contact recreation standards. In response to comments received on the Initial Draft MS4 Permit related to the need for integration between the MS4 permit requirements with other pollution control efforts currently under development by the NYC and the Department, Part II.B.2 was added to the Revised Draft MS4 Permit (replacing Part II.B.2 – Future TMDLs in the Initial Draft Permit). The MS4 permit

issued to NYC on August 1, 2015, requires that NYC consider whether additional or customized non-structural BMPs are warranted to address the pollutants of concerns causing the impairment identified in the CSO LTCPs and NYC must submit certain information, as prescribed by the MS4 permit, to the Department as part of the Stormwater Management Program plan. NYC must then implement those non-structural BMPs within the shortest reasonable time. These permit conditions apply to Priority MS4 Water bodies, which are those for which an approved CSO LTCP does not predict compliance with applicable water quality standards, including any finally promulgated water quality standards after the issuance of the permit, and where stormwater contributions from NYC's MS4 are expected to be a significant contributor of the impairment identified in the CSO LTCP. This approach is expected to complement the CSO LTCP to ensure water quality is restored.

Comment 18: Newtown Creek consent orders and LTCPs

Organizations have sought to challenge, for public health reasons, the aeration project in Newtown Creek, which stems from a consent order to raise water quality standards in the creek to the current Class SD standard of 3 mg/L. If the new criteria are put in place, what does it mean for existing consent orders that are addressing old standards? Existing consent orders and LTCPs already submitted should be updated to meet the new standards. One of the issues is saying it is not a public health concern, people are not supposed to be recreating there anyway. Given the proposed new bacteria level, will the aeration program will have to be entirely redesigned?

How will agencies like NYCDEP be held responsible to raise water quality to the new standards, specifically for Newtown Creek which receives more than 2 billion gallons of CSO discharge resulting in very poor water quality conditions? How will the enforcement mechanism work to drive the massive change needed to meet the new standards? There must be an open process with the community, going forth with future consent orders and new standards. There is a lot of concern because the community was left out of a lot of these processes. There needs to be enforcement or a mechanism to insure compliance of efforts.

Commenter: Newtown Creek Alliance

Response to Comment 18:

This rulemaking does not address the standard for dissolved oxygen (DO). With the adoption of this rulemaking, standards for fecal and total coliform will apply to Newtown Creek.

Comment 19: Newtown Creek and tributaries

There are differences in water quality between Newtown Creek (main channel) and several tributaries, including Dutch Kills, Maspeth Creek, East Branch and English Kills. It seems unreasonable that the main channel has the same designation as the head of English Kills. New criteria should include efforts to examine specific bodies of water that show significant variation in water quality parameters.

Commenter: Newtown Creek Alliance

Response to Comment 19:

With the adoption of this rulemaking, the proposed water quality standards will apply to all Class I and Class SD waters. This includes Newtown Creek, Dutch Kills, Maspeth Creek, and English Kills, all of which are Class SD. These standards are set to protect the quality of water for primary contact recreation and are not based on current levels of pollution in particular water bodies. Unless there are factors in 40 CFR 131.10(g) that support a UAA, and a UAA is developed and approved by EPA, the water quality in all waters must meet the swimmable goal of the CWA.

Comment 20: Existing uses

The broad topic of existing uses of Class I and or SD waters was mentioned. DEC must survey existing uses and account for this in the revised regulations. People swim in NYC waters already, from elite swimmers traveling to NYC to compete in destination open water races to local kids, often residents from environmental justice communities.

Water quality standards for Class I and Class SD waters were last revised in 2008. It is believed that much new information has come to light on the quality of Class I and Class SD waters, the means by which water quality may be further improved, and the actual existing uses for primary contact recreation, some of which is in the possession of DEC.

In 2013, over 60,000 members of the public were put on the water by various groups, not including independent kayakers, paddlers and rowers who launch on their own. This number has grown and they expect the number of people getting on the water to increase dramatically, as waterfront development, access points, and the NYC population itself continues to expand. The head coach of the Empire Dragon Boat Team stated that over the course of the summer, there are 2,000 paddlers going out into the water of Flushing Bay.

Water standards must be improved to protect existing users of the waters. DEC should survey and assess how people are using the water to provide a better picture of recreation. It is important to look at the existing uses. Nobody should be able to say the water quality goals can't be met.

Kayaking and boat paddling exist as primary contact activities, and the DEC needs to protect those existing uses under the CWA and comply with the law.

DEC failed to assess the attainability of primary contact recreation as a use, and failed to adequately address that primary contact recreation is an existing use. Existing uses must be designated as such and must be maintained pursuant to EPA's antidegradation policy. Even if primary contact recreation is not designated as a use, DEC is required by the CWA to assign a designated use of primary contact recreation, unless a UAA determines that the use is unattainable.

DEC should assess existing uses for these waters to ensure that these uses are protected and are taken into consideration in water quality improvement programs including LTCPs.

Many Class I and Class SD waters are already being used for primary or secondary contact recreation, including Newtown Creek, Flushing Bay, Gowanus Canal, Hudson River, Bronx River, Harlem River, and Jamaica Bay and its tributaries, even if their water quality does not currently meet the criteria. All existing uses that involve significant human contact with the water must be protected. DEC must designate primary contact recreation as a use because it is an existing use in Class I and Class SD waters.

According to online data, over 4,500 people every year participate in an average of 10 organized public swim events in Class I waters around New York City. New York City and New York State have surely been aware of these existing uses due to public swim events occurring for decades. Further, these waters are used extensively for other primary contact activities that are encouraged and promoted by New York City, including human powered boating.

In addition to actual uses sufficient to render primary contact as an existing use for CWA purposes, decades of water quality data suggest conditions sufficient to support this use exist, at some times and places, in Class I and Class SD waters. New York City sampling data documented a long term trend toward better water quality. The CWA requires DEC to now protect these existing uses by adopting water quality standards (both uses and criteria) that will drive solutions to the remaining water quality problems. Even if primary contact recreation was not considered an existing use, DEC would still be required by the CWA to assign these waters a designated use of primary contact recreation unless a UAA determines that such use is not attainable. It is difficult for an organization to make progress on Newtown Creek, especially with the existing use saying there are people already recreating on the water. The agency says it doesn't matter, but conditions don't reflect that statement.

Per federal regulations at 40 CFR 131.20, DEC is required to assess waters that do not include fishable-swimmable uses every three years to determine if new information has become available which indicates that these uses are attainable, and if so, DEC is required to revise its water quality standards to designate such uses. Existing uses attained as of November 28, 1975 cannot be eliminated, locking in a floor for future water quality standards to improve upon.

Assessment of existing uses can inform us whether the water body is being used seasonally or year round.

Commenters: Brous; Buchanan; CAC-HEP; Coover; E2; Empire Dragon; JamBay Ecowatchers; Kantrowitz; Newtown Creek Alliance; NRDC, Larry Levine; Orme; Riverkeeper/NRDC (Paul Gallay and Larry Levine) Sierra Club; Simon; SWIM Coalition; Tanikama

Response to Comment 20:

The Department acknowledges the extensive use of New York City waters for various forms of human-powered boating and that people swim in these waters. However these activities do not necessarily constitute “existing uses.”

Proof that people have been swimming in the water on or after November 28, 1975, absent data that the water quality is sufficient to support that activity, does not necessarily show that primary contact recreation is an existing use. The same is true for secondary contact recreation for Class SD waters.

First, for a use to be an existing use, it is not sufficient to merely show that someone (or multiple people) conducted such an activity in the water; the water quality must also be protective of that use. For example, a person (or groups of people) swimming in a water that does not meet primary contact recreation standards does not constitute an existing use. Second, it is not necessary to survey existing uses to require the quality of the waters to be protected for primary contact recreation. Requiring water quality to be suitable for primary contact recreation provides protection that is equivalent to designating primary contact recreation as a best use for the same waters.

The proposed rule would require that all Class I and Class SD waters have quality suitable for primary contact recreation. See also DEC’s Response to Comment 11 for a more in-depth discussion of why the Department believes it is not necessary to adopt a best use of primary contact recreation to protect water quality for that activity.

Comment 21: Purported consequences of not designating primary contact recreation as best use

If a best usage such as primary contact recreation is not specified by the water quality standards, DEC would not be able to enforce the best usage of a water body, e.g., primary contact recreation or swimming. Furthermore, not having a use designated for a waterway potentially means that:

- Requirements for the BEACH Act waters such as public notification for swimmer safety and requirements to adopt criteria at least as protective as EPA’s RWQC may not be triggered;
- CWA revolving fund grants could be jeopardized as there would be fewer impaired uses on waterways and thus a lower potential scoring for grant applicant ranking;

- Upstream jurisdictions may not have to limit pollution to protect downstream uses;
- Waterways might not be listed in the CWA 303(d) or 305(b) lists;
- CWA provisions regarding Total Maximum Daily Loads (TMDLs) might not apply.

Commenter: Riverkeeper/NRDC (Paul Gallay and Larry Levine)

Response to Comment 21:

The rulemaking gives DEC the authority to enforce the requirement that water quality must be suitable for swimming in Class I and Class SD waters, and to enforce the standards that protect for swimming.

Requiring water quality to be suitable for swimming is consistent with the goal of the CWA. Water quality requirements for public bathing beaches under the BEACH Act are under the jurisdiction of the New York State Department of Health (DOH). DOH water quality requirements are included in Subpart 6-2 of the State Sanitary Code.

The change to Class I and Class SD waters will bring DEC's requirements to protect these water classes for primary contact recreation in line with other waters of the state. For a more in-depth discussion of DEC's position regarding ambient water quality standards and the EPA 2012 Recreational Water Quality Criteria, refer to DEC's response to Comment 5.

Requiring water quality to be suitable for primary contact recreation provides protection that is equivalent to designating primary contact recreation as a best use for the same waters. It would not cause the loss of CWA revolving fund grants.

The requirement in current section 701.1 to protect downstream uses is unchanged by this rulemaking.

The DEC proposal is quite clear that "the water quality (of Class I and SD waters) shall be suitable for primary contact recreation." Thus, these waters will be required to meet all water quality standards associated with primary contact use. For determining CWA section 303(d) listed waters, making CWA section 305(b) assessments, developing and implementing TMDLs, discharge regulation of upstream jurisdictions, evaluating the level of impairment in waters for grant/funding need, and/or satisfying BEACH Act requirements, the applicable standards, targets, and benchmarks to be used will be those criteria established for the support of primary contact recreation.

Comment 22: Standard for pathogen indicators expressed as an average value is not protective

Coliform standards should not be expressed as a geometric mean or monthly median, including a 30-day mean from 5 samples per month, because these intervals are not protective of public health. No one comes into contact with “average” water; people do not swim or kayak in monthly average water quality.

Criteria for pathogen indicators for increasing recreational users of the urban waterways should be more relevant, understandable, and protective, as well as based on a single sample maximum testing approach. The sample should be based on a single sample approach rather than an average sample. Water quality criteria should be relevant to the people who use the waters; people are exposed to a high concentration of bacteria on a given day and the geometric mean is irrelevant – it doesn’t matter if the average is lower than the standard. Waters should be safe for contact whenever people do come in contact with it.

The proposal should be revised to include standards based on a statistical threshold value (STV) as in the EPA RWQC or a single sample maximum. The EPA’s new criteria reflect the understanding that people don’t swim on an average day and require use of the geometric mean and an STV. DEC provides no scientific support for backsliding away from the updated 2012 RWQC; there is no site specific reason why a geometric mean would suffice, or why using enterococcus would not suffice.

Commenters: Brous; CAC-HEP; Coover; JamBay Ecowatchers; Kantrowitz; Kriesberg; Newtown Creek Alliance; Riverkeeper/NRDC (Paul Gallay and Larry Levine); SWIM Coalition; Tanikama

Response to Comment 22:

The monthly median and geometric mean are only part of the standards in this rulemaking. The total coliform standards adopted by this rulemaking for Class I and Class SD waters include a requirement that not more than 20% of the samples exceed 5,000.

The Department may revise its water quality standards with respect to pathogen indicators (specifically, enterococcus) for waters of New York State under the national EPA guidance, as part of New York State’s normal triennial review of its standards.

Comment 23: Departure from EPA RWQC not supported; proposed standards cannot be approved by EPA

The Department’s proposal did not provide either scientific support or a stated basis for departure from the 2012 RWQC and as such, under the CWA, EPA cannot approve these criteria.

Commenter: Riverkeeper/NRDC (Paul Gallay and Larry Levine)

Response to Comment 23:

The Department's rationale for proposing total and fecal coliform standards rather than enterococcus is explained in DEC's response to Comment 5. The Department cannot speculate as to whether the EPA would approve the proposed standards; as that is a decision to be made by the EPA.

Comment 24: Not designating primary contact as a use deprives NYS of BEACH Act grants

By failing to designate primary contact as a use, New York State is closing its own door for BEACH Act grant applicability.

Commenter: Riverkeeper/NRDC (Paul Gallay and Larry Levine)

Response to Comment 24:

The comment is incorrect. The proposed amendments will not impact New York State's BEACH Act grant funding. The BEACH Act grant is administered by the New York State Department of Health for water quality monitoring and public notification activities at public bathing beaches. There are currently no public bathing beaches in the areas affected by the proposed amendment. The affected areas are not likely to support public bathing beaches in the future because of maritime traffic and shoreline topography and vegetation.

Comment 25: Degradation at watershed level

What will DEC do to improve water quality degradation at the level of the watershed? What and how will the proposed engineering, design and social practices be capable of reforming the traditional ideologies and behaviors?

Commenter: Ringenary

Response to Comment 25:

Approved water body/watershed facility plans and future LTCPs are completed on a watershed basis, and thus take a holistic approach to planning. The City has outreach programs aimed at

educating the public on best practices for protecting water quality, however, changes in social practices generally occur on a generational basis.

Comment 26: Enforcement of attaining water quality thresholds

What and how will enforcement of attaining water quality thresholds be accomplished/how will it be regulated, engineering-wise? What is the mechanism to enforce compliance, because some of the places in Newtown Creek have such poor water quality? Although conditions are so bad, those agencies that are responsible for cleaning up the waters should be bound to do so.

Commenters: Newtown Creek Alliance; Ringenary

Response to Comment 26:

For approximately 100 years, New York City has been using a Harbor Survey Monitoring Program, which provides extensive data on long-term trends in water quality for City water bodies. The data from the Monitoring program are used to assess attainment with water quality standards; this is discussed in greater detail in DEC's response to Comment 3. In addition, pursuant to ECL Section 17-0501, the DEC has the authority to ensure compliance with water quality standards using permitting and enforcement actions. New York City is under several enforcement orders for water quality violations.

Comment 27: Sanitary survey

Will a sanitary survey be conducted before water usage standards are changed?

Commenter: Ringenary

Response to Comment 27:

A sanitary survey is not required for this rulemaking. Water quality standards are set independent of the actual water quality. However, New York City has had a Harbor Survey Monitoring program for approximately 100 years, which provides extensive data on long-term trends in water quality for the City water bodies. The data from the Monitoring program are used to assess attainment with water quality standards; this is discussed in greater detail in DEC's response to Comment 3.

Comment 28: Waste Water Treatment Facilities and population growth

How are the Waste Water Treatment Facilities being maintained, designed, built, etc., to accommodate increases in capacity yet reduce impacts and risks associated with discharges? Will the issue of population growth driving the motivation by New York City for continuous economic development be addressed?

Commenter: Ringenary

Response to Comment 28:

New York City wastewater treatment and CSO facilities are designed and permitted to account for increases in population growth. The LTCPs for the CSOs utilize a planning horizon to 2040 and take into consideration projected population growth during that time period. Under the SPDES permits, the City is required to develop a flow management plan when the treatment plant reaches or exceeds 95% of the design capacity (see 6 NYCRR Part 750, 2.9(c)).

Comment 29: Unregulated septic systems

Will unregulated septic systems be addressed?

Commenter: Ringenary

Response to Comment 29:

This comment is not related to the proposed rule, however, septic systems in New York City are regulated under Chapter 18 of Rules of New York City. In addition, pursuant 6 NYCRR Part 750-1.5(4), the Department has authority to regulate septic systems with capacities of over 1000 gallon per day that are causing a discharge to waters of New York State.

Comment 30: Management of non-attainment events

How will non-attainment events be managed?

Commenter: Ringenary

Response to Comment 30:

Data from the City's Harbor Survey Monitoring Program and long-term post-construction monitoring in conjunction with water quality modeling will be used to ascertain attainment and non-attainment with water quality standards. DEC has the regulatory authority to ensure that non-attainment events will be addressed.

Comment 31: Sediment contamination

Will sediment contamination issues (known to impact Jamaica Bay and the Gowanus Canal) be considered in relation to the proposed usage, and will this have an impact on public health?

Commenter: Ringenary

Response to Comment 31:

This rulemaking addresses pathogen standards and the quality of Class I and Class SD waters for swimming. It did not address toxic pollutants. Jamaica Bay is currently Class SB and is not affected by this rulemaking. The decision to require the quality of all Class I and Class SD waters to meet the swimmable goal of the CWA was made independent of current levels of water quality and any presence of contaminated sediment. The rebuttable presumption is that all Class I and Class SD waters will meet the swimmable goal of the CWA. However, if any of the six factors in 40 CFR 131.10(g) apply to a specific waterbody, a UAA may be developed and approved by EPA. UAAs are discussed in greater detail in DEC's response to Comment 16.

Comment 32: Habitat restoration and protection; tree removal and planting

Multiple questions were submitted about New York City's management practices for the removal of trees and underbrush, given the value of trees for water quality and reducing impacts from flooding.

Commenter: Ringenary

Response to Comment 32:

These questions are not related to this rulemaking. The commenter may wish to address these questions to New York City.

Comment 33: Water quality management planning

There should be a solid water quality management plan to ameliorate the CSO and storm water runoff problems. DEC needs to ensure these changes will improve NYC's CSO plans and other ongoing water quality planning.

Commenters: Brous; JamBay Ecowatchers

Response to Comment 33:

DEC will ensure that all New York City water quality programs will be developed to meet any adopted water quality standards.

Comment 34: “Other factors” language

The “other factors” language for Class I creates confusion. While it is understandable that factors may limit primary contact use, it is not clear what non-water quality factors may limit primary recreation while allowing secondary contact recreation. Presumably, if one is able to launch a human powered vessel, one could also put their body in the water.

Is it necessary to include the qualifier “although other factors may limit”? These are water quality standards and not infrastructure or physical quality standards for water body uses. This language creates ambiguity and may offer a way out of meeting the water quality standards. For example, a city agency might argue that if a water body does not have a shoreline feature that allows access, then the water quality does not have to meet the primary contact recreation criteria. There are many parts of the harbor and estuary where primary recreation may require a heightened level of experience and communication on the part of the users (e.g., crossing shipping channels), but the goal remains that all water bodies should have water quality that is fishable and swimmable. DEC should not consider non-water quality factors in designating uses.

Commenter: CAC-HEP

Response to Comment 34:

“Other factors” refer to physical and/or suitability factors that are not related to water quality. Examples of such factors include swift water, water depth, rocks, waterfalls, heavy shipping traffic, etc. Water quality must be suitable for primary contact recreation regardless of whether or not other factors limit the use for that purpose.

The “other factors” language already applies to Class SC, Class C, and Class D waters, and with the adoption of this rulemaking, will apply to Class I and Class SD waters as well. This language is clear that other factors refer to factors other than water quality, given that it says “water quality shall be suitable...but other factors may limit the use...” However, in a triennial rulemaking, DEC will consider whether additional wording could be added to provide even greater clarity.

There could be places where it would be suitable to paddle, but not to swim. For example, the water could be deep enough to launch a kayak or canoe, but not deep enough to swim. There can also be deeper waters that are not suitable for swimming, but may be suitable for paddling.

The “other factors” language does not offer a “way out” from the water quality standards. This language specifically states that water quality shall be suitable for primary contact recreation

although other factors may limit the use for that purpose. Even if other factors limit the use, the water quality must meet the swimmable standards.

The Department shares the intent for all waters to meet the swimmable goal of the CWA, and this rulemaking achieves this goal.

DEC believes there are water bodies of the state not suitable for swimming due to non-water-quality reasons. However, the water quality of these areas would still be required to meet the standards for primary contact recreation.

Comments about the fishable goal of the CWA are addressed in DEC's response to Comment 38.

Comment 35: Urban tributaries

Certain New York City water bodies have a unique status as urban tributaries where swimming may be unsafe due to factors other than pathogens. As DEC currently classifies them, primary contact uses are inconsistent with their status as working water bodies with active navigational uses or other constraints such as bulk heading, low flows, or security restrictions. These urban tributaries pose very small risks of exposure to humans in areas where swimming is not a designated, appropriate, or permitted use.

NYCDEP seeks to prioritize its investments in improving water quality in those waters with active recreational uses or which have a reasonable potential for such uses in the foreseeable future. NYCDEP is concerned about the imposition of water quality standards designed for the sole purpose of protecting swimming in water bodies where no such use is permitted or advisable.

Commenter: NYCDEP

Response to Comment 35:

DEC does not have a formal classification or recognition of any waters as "urban tributaries." The change to the description of Class I and Class SD in Part 701 would recognize that "other factors," not related to water quality, may limit the use in such waters, where swimming may not in fact be appropriate. However, the quality of the water would still have to meet the swimmable standards as required by the CWA.

Comment 36: Shared Waters with New Jersey

It is hoped that New York's work will spur New Jersey to honor its commitment to reclassify its waters for primary contact.

Water quality standards affect our shared water bodies, such as the Hudson River, Kill Van Kull, and Arthur Kill. How do we expect New York City to meet the standards when municipalities in New Jersey are not required to meet the same standards? The Hudson River and likely other bi-state water bodies are already used for swimming and human-powered boating. If primary contact recreation is an already existing use, even if people only enter the water from one state or another, it behooves us to designate these water bodies for primary contact recreation for both states.

Commenters: CAC-HEP; NY-NJ Baykeeper/HRK

Response to Comment 36:

The Department works closely with EPA and New Jersey regarding the shared waters of the NY-NJ Harbor. However, this proposed rule only applies to New York's waters, and New York does not have the authority to designate uses for waters of another state. New York's water quality standards and New Jersey's water quality standards each apply to that state's portion of the shared water. Pollution from one state must not cause a violation of another state's standards. The commenters may wish to address these questions to the State of New Jersey. For the Department's position regarding existing uses, see DEC response to Comment 20.

Comment 37: Access to waterways

Access should be provided to the Harlem River from the campus of the JFK High School in the Bronx. There should be a walking and biking trail along the edge of the southern Bronx Harlem River, which would benefit students by researching and understanding design processes and scientific monitoring of data necessary to reestablish the Harlem River as a swimmable river.

It is not possible to swim in the Hudson River because of the lack of access to it.

Commenter: Steiner; Gershenbaum

Response to Comment 37:

This rulemaking addresses water quality, and not access to waters, including the Harlem River and the Hudson River. These issues are beyond the scope of the current rulemaking. The commenters may wish to address hiking, access, and walking trail questions to the New York City Department of Parks and Recreation or local elected officials.

Comment 38: Regulations should be for fishable and swimmable waters

Regulations should be for fishable, swimmable waters, to protect and promote public health. Water quality standards must achieve the CWA fishable-swimmable goal for all waters. The waters must also meet the fishable goal of the CWA.

Commenters: Brous; JamBay Ecowatchers; Sierra Club

Response to Comment 38:

The Department agrees that all waters should meet the fishable–swimmable goals of the CWA. In the current regulations, waters of Class AA, AA-Special, A, A-Special, B, C, D, SA, SB, and SC must meet both the fishable-swimmable goals, and Class I waters must meet the fishable goal. This rulemaking addresses the remaining waters that do not meet the swimmable goal. With the adoption of this rulemaking, Class I and Class SD waters must meet the swimmable goal – thus, all waters will be required to meet the swimmable goal. The only remaining water classes that are not required to meet the fishable goal are Class D freshwaters and Class SD saline waters.

Including standards that would bring Class SD waters into compliance with the fishable goal required by the CWA would involve much more extensive studies and examination. This will be considered as part of a future rulemaking.

Comment 39: Lack of resources for New York City compliance

There is a lack of resources for New York City compliance. State assistance in finding and developing a financing scheme to accomplish the goal of cleaner waters for recreation is needed. Environmental sustainability is a necessary social responsibility for everyone to burden.

Commenter: Gene

Response to Comment 39:

The NYS Environmental Facilities Corporation (EFC) provides low interest loans to support the construction of wastewater and CSO infrastructure. New York City receives funding support from the EFC on a regular basis and undertakes extensive financial planning to ensure funding is available for their infrastructure programs.

Comment 40: Lack of protection for the Arthur Kill and Kill Van Kull

The proposal omits protection for the Arthur Kill and Kill Van Kull, and should extend protections to these waters. Swimmable water throughout the harbor estuary is the ultimate goal and nothing less than true primary contact protection now will achieve that. If DEC can protect the Gowanus Canal and Hudson River, DEC can apply the same standards to the Arthur Kill and Kill Van Kull. People swim in these waters and are entitled to protection as any other New Yorker.

Commenter: NY-NJ Baykeeper/HRK

Response to Comment 40:

This rulemaking applies to all Class I and Class SD waters, which includes the Arthur Kill and Kill Van Kull, both of which are Class SD. With the adoption of this rule, both the Arthur Kill and the Kill Van Kull will have applicable coliform standards and must have water quality suitable for primary contact recreation.

Comment 41: Waters safe to touch

The CWA established the goal of water bodies that are always safe to touch. Allowing a standard that ensures water bodies are usually safe to touch is simply not good enough.

Commenter: NY-NJ Baykeeper/HRK

Response to Comment 41:

The goal of the CWA is for waters to be swimmable, not merely touchable. However, if waters are of suitable quality to swim in, they would also be of a quality suitable to touch. With the adoption of this rulemaking, the quality of all Class I and Class SD waters must be suitable for swimming.

Comment 42: Climate change

Use standards should be expanded to address climate resiliency planning because people find themselves unexpectedly swimming and wading in public waters during storm events. Furthermore, water quality protections should encompass shore flooding conditions as sea level changes and flooding events occur. Due to climate change, the frequency of flooding occurs more often, exposing the general public to all waters and putting them at risk.

Clean water is also important for resiliency of our communities and for protecting our coasts. The Department's recently released report, "Coastal Green Infrastructure Plan for New York

City” notes that water quality degradation is contributing to the decline of salt marshes and other coastal features, which reduce risks to coastal properties from waves, flooding, and erosion. Strong water quality standards are of paramount importance toward adapting to a changing climate.

People are being exposed to pathogens in a lot more intense ways besides choosing to recreate because of the climate change and the control of pathogens in unsafe conditions. We need to be protective of people coming into contact with water where it is not supposed to be due to climate change and storm surges and other issues. A concern is bacteria in the water that need to be controlled, because per CDC, New York City has the highest rate of bacteria resistant infections in the U.S. It is becoming a greater concern that bacteria are being released into our communities more and putting more people at risk. Our hospitals have the highest rates of antibiotic resistant bacteria, they use the sewer systems, and these elements would be released. So, we do want levels of control of pathogens, so we are really going to address climate change more.

The level of action by DEC and DEP regarding climate change is frustrating.

Commenters: Buxbaum; Donnelly; FROGG; JamBay Ecowatchers; Simon; TNC

Response to Comment 42:

Climate resiliency is not a current “best use” or suitability requirement of any class of waters in New York State. With the adoption of this rulemaking, the quality of all Class I and Class SD waters must be suitable for primary contact recreation. Thus, if flood waters from these classes do move inland, they would be required to meet standards for indicators of pathogens.

Climate change per se is not part of this rulemaking. DEC has a climate change office (<http://www.dec.ny.gov/about/43166.html>). The commenter is urged to express concerns about DEC and or NYCDEP actions on climate change to the DEC Climate office and or NYCDEP respectively.

Comment 43: New York City history of water quality improvement

NYCDEP cited their long history of action and research to improve water quality, beginning with the construction of some of the first waste water treatment plants in the nation. Efforts continue, often in partnership with DEC (examples were provided). NYCDEP is actively engaged in planning, designing and building multiple projects to address CSOs throughout the city based on current standards. DEP has invested more than \$10 billion since 2002, resulting in water quality in the harbor the best it has been in 100 years. NYCDEP remains committed to making additional substantial investments to further improve water quality. The proposed rule reflects DEC’s recognition of the tremendous strides in improving water quality and generally

supports upgrading water quality standards including opening more water bodies to primary contact recreation where appropriate. New York City seeks opportunities to expand its 14 miles of public bathing beaches, currently serving about 7 million swimmers per year. Beach waters are rigorously monitored by New York City.

Commenter: NYCDEP

Response to Comment 43:

The Department acknowledges that New York City has made significant investments in waste water treatment resulting in major improvements in water quality. However, the Department maintains that the proposed rule is necessary to meet the swimmable goal of the CWA for all waters.

Comment 44: Opposes designating all Class I and Class SD waters as suitable for primary contact; proposal does not explain non-exceedance of federal minimum standards

Class I and Class SD use classifications need to be preserved under the proposed rule. In the proposal, the waters are not being reclassified and their best usages would remain secondary contact recreation and fishing for Class I and fishing for Class SD; New York City fully supports maintaining the Class I and SD use classifications.

Designation of all Class I and SD waters as suitable for primary contact would effectively leave no distinction among the various use classifications under state law. Many waters in and around New York City, particularly the small urban tributaries, have characteristics that make primary contact recreation unsafe or infeasible, such as low flow, bulkheading, shipping traffic, and security restrictions preventing access. Federal and state law and regulations support the adoption of different water body use classifications, and different water quality criteria to support those various water body uses. A “one size fits all” primary contact designation, as many commenters request, is neither sensible nor required, and ignores the other important existing water body uses and their impacts to recreation.

The proposed rulemaking documents do not adequately explain DEC’s position that the proposed rule does not exceed federal minimum standards. DEC considers it a federal minimum requirement that all waters must have pathogen levels that meet swimmable criteria, regardless of whether swimming is a designated use or whether there are other factors (e.g., security restrictions, industrial use, or dangerous levels of toxic pollutants) that makes swimming unfeasible or dangerous. This position would be inconsistent with the basic framework of the CWA, which recognizes that different water bodies are appropriately assigned different uses. The CWA and EPA regulations and guidance appear to require only that water quality criteria protect the designated uses of water, and pathogen standards develop to protect swimmers are only applicable to waters designated for primary contact.

Commenter: NYCDEP

Response to Comment 44:

Although the NYS ECL, at 17-0301(2), does require that waters be grouped into classes, the CWA also clearly requires that all waters meet the national goal of swimmable by 1983. There is no legal rationale that grouping the waters into classes means that any of those classes must not or should not meet the swimmable goal of the CWA. The Department does not believe that having different uses assigned to different water bodies relieves certain water bodies from the CWA's swimmable goal. Nothing in the assignment of different uses for different waters in the CWA or New York State Environmental Conservation Law suggests this.

EPA's regulations at 40 C.F.R. Part 131 interpret and implement the provisions of Sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards protect section 101(a)(2) uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. Unless the state rebuts this presumption, a default designation of the section 101(a)(2) uses applies. Where a state believes that a use specified in section 101(a)(2) is not attainable and wishes to remove or subcategorize this use, the state is required to demonstrate that the use is not attainable based on one or more of the factors included in 40 C.F.R. Part 131.10(g) through the completion and submission to EPA of a UAA. In addition the State must show that the change in use will not result in removing an existing use.

Comment 45: Opposes application of primary contact criteria to all Class I and SD waters

NYCDEP opposes the proposed rule's uniform application of primary contact criteria to all Class I and Class SD waters. Instead of adopting such uniform primary contact criteria, regardless of whether it or primary uses can be attained, DEC should identify those Class I and Class SD waters that the public currently uses for primary contact, where primary contact water quality is attainable through reasonable controls, and apply primary contact criteria to those water bodies where appropriate.

It is unrealistic and inappropriate to require primary contact coliform standards everywhere, regardless of costs and regardless of the potential for human contact with the waters. Absent investments on a massive and unprecedented scale and construction of huge storage tanks and tunnels or other treatment facilities where swimming is not advisable or allowed, the requirement would result in inevitable, continual, and pervasive noncompliance and could divert resources from more needed areas. New York City welcomes the opportunity to provide information and support toward achieving primary contact where reasonably achievable and for appropriate waters as describe above.

NYCDEP supports DEC's efforts to improve water quality in waters not designated for primary contact, and fully intends to identify and implement reasonable controls of discharges from CSOs regardless of whether such controls are required under current water quality standards. The City would further support DEC's efforts to incrementally improve water quality in current Class I and Class SD waters above the existing standard even if water quality meets the current requirements.

Commenter: NYCDEP

Response to Comment 45:

The Department acknowledges New York City's efforts to improve certain waters. However, the CWA clearly requires all waters to achieve the swimmable goal. If there are certain Class I or Class SD waters where meeting primary contact standards is unattainable according to at least one of the six factors provided by federal regulation (40 CFR 131.10(g)), New York City can prepare a UAA and submit it to the Department. See also DEC's responses to Comment 16 for additional discussion of UAAs.

Comment 46: Applicability of 2012 RWQC to Class I and SD waters

The Department's statement indicating that Recreational Water Quality Criteria (RWQC) will apply to Class I and Class SD waters needs to be clarified. At the January 6, 2015 information session on the proposed rule, DEC indicated it would likely apply the EPA RWQC to Class I and Class SD waters. EPA's position is understood to be that RWQC apply only to waters designated for primary contact (NYCDEP provided citations). Because DEC's proposed rule does not change the designated use(s) of Class I and Class SD waters to include primary contact recreation, we question DEC's statement that RWQC would likely apply to such waters. EPA's RWQC are substantially more difficult and more expensive to attain. DEC should not, as a result of the proposed rule, seek to apply the RWQC to all Class I and Class SD waters given EPA's clear direction that RWQC are to apply to waters designated for primary contact recreation, and should clarify that the proposed rule does not have this effect.

Commenter: NYCDEP

Response to Comment 46:

EPA's 2012 RWQC can only be adopted into New York's regulations through the formal rulemaking process. The current rulemaking is not related to the 2012 RWQC. With the adoption of this rulemaking, all Class I and Class SD waters have standards for total and fecal coliforms and be required to be suitable for primary contact recreation. EPA concurs that this provides protection equivalent to adopting a best use of primary contact recreation for these waters.

The Department will consider whether to revise its water quality standards with respect to pathogen indicators (specifically, enterococcus) for waters of New York State under the national EPA guidance, as part of New York State's normal triennial review of its standards. If done, the rulemaking would make clear whether or not the enterococcus standards applied to Class I and SD waters, and the public would be provided an opportunity to comment thereon.

Comment 47: Compliance with the CWA

The proposed rulemaking documents do not adequately explain DEC's position that current New York State water quality standards do not comply with the CWA. DEC is asked to clarify the basis for DEC's assertion that any water body with pathogen criteria that does not support swimming is not in compliance with the CWA. Why must swimmable pathogen criteria be applied to waters regardless of whether primary contact recreation is a designated use and or a use that is precluded due to other factors unrelated to pathogens, given that ratepayers would bear the substantial costs of compliance? The CWA provides that "such standards shall be established taking into consideration the waters' use and value for public water supplies, propagation of fish and wildlife, recreational purpose, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." (CWA section 303(c)(2)(A)). While DEC refers to the swimmable goal in CWA section 101(a)(2), the specific requirements are set forth in other sections of the CWA and EPA regulations.

Commenter: NYCDEP

Response to Comment 47:

Under the CWA, by 1983 all waters were to have achieved the goal of "recreation in and on the water" (i.e., swimmable). Existing New York State water quality standards for Class I and Class SD waters do not protect the water quality for primary contact recreation.

Comment 48: Allowance of less stringent/secondary recreation pathogen criteria

EPA's recent RWQC reiterates that new or revised criteria, when adopted into state standards must be scientifically defensible and protective of the designated uses of the water bodies. DEC's current water quality standards for Class I and SD waters, including applicable pathogen criteria, were approved by EPA. In addition, EPA's Guidance, Coordinating CSO Long-Term Planning with Water Quality Standards Reviews, July 31, 2001 explicitly allows states to adopt less stringent pathogen standards for waters that are not designated for primary contact. Further, that document states that EPA's policy is that secondary contact criteria adopted by a state should be appropriate for the anticipated use and not exceed a geometric mean five times EPA's recommended water quality criteria for primary contact recreation. Applying a less stringent

criterion to a water where only secondary contact activities occur should result in no greater risk of gastrointestinal illness than does water bodies designated with primary contact rec. Finally, that per the DEC rulemaking documents, most of the waters to which the proposed rule will apply are affected by CSOs, and the EPA 2001 guidance is therefore particularly relevant to this proposed rule.

In light of these provisions, DEC needs to clarify why it believes the CWA requires pathogen criteria that were developed to support swimming must be applied to all waters regardless of their designated use, including waters that are not designated for swimming, given that ratepayers will bear the substantial costs of compliance with those criteria.

Commenter: NYCDEP

Response to Comment 48:

EPA currently provides no criteria recommendations for secondary contact recreation (see <http://water.epa.gov/scitech/swguidance/standards/criteria/current/index.cfm>). Further, as explained in the proposed rulemaking, the Department has proposed to repeal its existing secondary contact recreation standards for total and fecal coliform because they are not supported by current science. The goal of the CWA is for all waters to be suitable for primary contact recreation. DEC currently has no standards for pathogens or pathogen indicators for Class SD waters.

With the adoption of this rulemaking, the quality of all Class I and Class SD waters is required to meet the swimmable goal of the CWA.

EPA's regulations at 40 C.F.R. Part 131 interpret and implement the provisions of Sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards protect section 101(a)(2) uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. Unless the state rebuts this presumption, a default designation of the section 101(a)(2) uses applies. Where a state believes that a use specified in section 101(a)(2) is not attainable and wishes to remove or subcategorize this use, the state is required to demonstrate that the use is not attainable based on one or more of the factors included in 40 C.F.R. Part 131.10(g) through the completion and submission to EPA of a UAA. In addition the State must show that the change in use will not result in removing an existing use.

It is important to note that DEC completed a UAA in 1985 that provided justification for the current standards for New York City waters. The UAA was instrumental in establishing the City's eligibility for substantial funding under the 1981 Federal Municipal Wastewater Treatment Construction Grants Amendments to construct and upgrade numerous wastewater treatment plants, which subsequently reduced discharges of sanitary sewage, one of the major sources of impairment. The UAA recommended that the classifications of these waters be revisited in the future. This rulemaking achieves the objective envisioned by the UAA of ensuring that Class SD and Class I waters meet the swimmable goal.

Comment 49: Use attainability analysis (UAA) applicability and CSO Consent Order

DEC should clarify the effect the proposed rule would have on the applicability of federal use attainability regulations. Under 40 CFR 131.10(g), a state may remove a designated use based on one or more of six factors (details were provided from EPA 2001 CSO LTCP/WQS Review Guidance). Presently, DEC may assign a I or SD classification for a water body if DEC is able to demonstrate, through a valid UAA that swimming (Class I) or primary and secondary recreation (Class SD) is not feasible. The proposed rule states that coliform standards that support swimming will be applied to Class I and Class SD waters even though other factors may limit primary contact. The 2012 Consent Order provides that under certain circumstances, NYCDEP will submit a UAA demonstrating the highest attainable use, which the state will then consider in adjusting water quality standards, classifications or criteria and developing water body specific criteria.

The existing CSO consent order is based on current water quality standards and explicitly provides that DEC may adjust the water quality criteria and or adopt water body specific criteria for CSO. Federal law and regulation and EPA's 2001 Guidance supports the application of less stringent standards where there are logistical or safety constraint for swimmers. NYCDEP requests that DEC affirms that it does not intend, through the proposed rule, to restrict the use of the UAA process to establish site specific water quality standards that are less stringent than the proposed pathogen standard where appropriate.

Commenter: NYCDEP

Response to Comment 49:

This rulemaking does not alter the applicability of federal use attainability regulations or restrict the use of the UAA process.

EPA's regulations at 40 C.F.R. Part 131 interpret and implement the provisions of Sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards protect section 101(a)(2) uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. Unless the state rebuts this presumption, a default designation of the section 101(a)(2) uses applies. Where a state believes that a use specified in section 101(a)(2) is not attainable and wishes to remove or subcategorize this use, the state is required to demonstrate that the use is not attainable based on one or more of the factors included in 40 C.F.R. Part 131.10(g) through the completion and submission to EPA of a UAA. In addition the State must show that the change in use will not result in removing an existing use. See also DEC's response to Comment 16.

Comment 50: Costs analysis insufficient and incorrect

DEC did not adequately support the conclusion that the proposed amendments would not impose any costs on New York City above and beyond costs that are currently required. If the proposed rule does not represent the minimum requirement, the cost analysis is insufficient and DEC must include a more thorough analyses of incremental costs relative to compliance with the existing water quality standards for Class I and Class SD waters.

Commenter: NYCDEP

Response to Comment 50:

The Department stands by its conclusion, as articulated in the RIS for the proposed rulemaking, that the rulemaking does not impose any additional costs on New York City or regulated persons above what is currently required. New York City presented no information that would indicate that the Department's conclusion is incorrect.

Comment 51: Cost of compliance underestimated due to incorrect interpretation of IEC regulations

The cost of compliance is underestimated due to inaccurate information. The DEC RIS indicates that because Alley Creek and tributaries to Jamaica Bay are currently classified as Interstate Environmental Commission (IEC) Class A waters, the proposed rule would impose no new requirements or costs for these waters. However, the only parameter for which the IEC sets ambient water quality standards for these waters is dissolved oxygen. The IEC does impose fecal coliform limitations for effluent discharging to IEC waters, but does not regulate ambient water quality for fecal coliform. Thus, there is no basis to conclude that compliance with the IEC rules would require pathogen reductions from New York City's CSOs.

Commenter: NYCDEP

Response to Comment 51:

The Department stands by the RIS. In part, the IEC regulations are but one of four reasons as explained in the RIS, for why there is no new regulatory impact from the proposed rule. While the IEC has not adopted ambient coliform standards for its waters, the IEC regulations at 2.03(b) clearly require that IEC Class A waters be "suitable for all forms of primary and secondary contact recreation." For a water to be suitable for primary contact recreation, it must have pathogen levels that are protective of swimming.

Comment 52: Costs re CSO discharges are underestimated

The costs of treating or eliminating CSO discharges that cause or contribute to exceedences of the proposed coliform criteria, would likely be in the range of \$3 billion in the tributaries to more than \$9 billion if open waters are included.

Commenter: NYCDEP

Response to Comment 52:

The Department based its cost estimates on data provided by New York City in the City's Waterbody/Watershed Facility Plans (WWFPs) and Long-Term Control Plans (LTCPs). The specific data source for each cost estimate is referenced in Table 3 of the RIS. In general, the Department's estimates are intended to provide a rough order of magnitude for construction costs to mitigate the impacts of CSOs in certain water bodies. The data provided by New York City in its WWFPs and LTCPs is the most accurate and relevant data available to DEC for this purpose. The Department used this data to develop its cost estimates based on generally accepted engineering practices for projects at the planning stage.

The cost estimates are considered to be the Association for the Advancement of Cost Engineering Class 5 estimates, which are used when there is very limited information available on a proposed project. Class 5 estimates typically have an accuracy range of minus 50% to plus 100% (-50/+100). Accordingly, the Department's estimates of \$5.8 to \$6.5 billion correspond to a possible range of costs from \$2.9 to \$13 billion, which is consistent with the range of costs presented by the City in their comments.

No new or revised cost estimates were submitted by New York City with their comments. However, even if new costs estimates were made available to DEC, the Department maintains, as articulated in the RIS for the proposed rulemaking, that the rulemaking does not impose any additional costs on New York City or regulated persons above what is currently required.

Comment 53: Costs of 100% CSO capture

Some commenters have expressed a preference for CSO volume reduction instead of disinfection projects. New York City estimates that the costs of 100% CSO capture would range from \$24 billion for the tributaries to \$84 billion for the tributaries and open waters. Thus, if New York

City were required to comply with the proposed rule through CSO volume reduction alone, it would pose a significant cost burden on New York City residents, more than 21% of whom are below the federal poverty line. Further, construction of massive CSO and stormwater storage and/or treatment facilities would be a considerable burden and disruption to local communities. New York City would likely need to acquire large tracts of land, resulting in the loss of that land for preferred community uses.

Commenter: NYCDEP

Response to Comment 53:

New York City is required to complete LTCPs for all CSO impacted water bodies in accordance with the federal CSO Control Policy, and these plans will identify the preferred alternative for abating CSOs. It is premature for the Department to comment on what may be the preferred alternative until the LTCPs are completed and reviewed and subject to public comment.

Comment 54: Cost of applicability of EPA RWQC enterococcus standards

If the rule changes the status of Class I and Class SD waters such that the EPA's RWQC enterococcus standards will apply, DEC must consider the costs of meeting that requirement. If DEC believes that the RWQC will now apply to Class I and Class SD waters, or that this rule makes such application mandatory in the future, DEC should include the costs of meeting those standards in the RIS.

Commenter: NYCDEP

Response to Comment 54:

DEC is required to complete formal rulemaking if and when it proposes new water quality standards rules, including EPA's 2012 RWQC. The current rulemaking is not related to the 2012 RWQC.

EPA promulgated "Water Quality Standards for Coastal and Great Lakes Recreation Waters; Final Rule" Vol. 69, No. 220 / Tuesday, November 16, 2004, pp. 67218-67243 (69 FR 67218) ("2004 federal BEACH Act Rule"). The BEACH Act also added section 502(21)(A) to the CWA, which defines "coastal recreation waters" as "(i) the Great Lakes; and (ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities." Section 502(21)(B) explicitly excludes "inland waters; or "waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea" from the definition of coastal recreation waters.

The 2004 federal Beach Act Rule applies to all coastal recreation waters in New York State that have either a best use or a suitability requirement for primary contact recreation. With the

adoption of DEC's rulemaking, the quality of all Class I and Class SD waters must be suitable for primary contact recreation. At that time, certain waters of New York will newly meet the definition for "coastal recreation waters." These are the Class I waters of Lower New York Bay, and Upper New York Bay, south of the southern tip of Manhattan (The Battery).

Based upon information available to the Department (City-Wide Long Term CSO Control Planning Project East River and Open Waters Water body/Watershed Facility Plan Report Draft June 2007), DEC concludes that the EPA 2004 federal BEACH Act Rule enterococcus standards would be met in these waters; thus there would be no regulatory impact from the applicability of the federal standards to these waters, and no need to revise the regulatory impact statement.

The cost analysis for the DEC rulemaking cannot speculatively consider the future costs of applicability of future standards. If the Department in a future rulemaking proposes to adopt the 2012 EPA RWQC for enterococcus to saline (and/or fresh) waters, DEC would prepare a separate regulatory impact statement for that rule.

Comment 55: Compliance season and costs

The estimated cost of compliance in the RIS is based on attainment of the proposed fecal coliform standard during the recreation season. The proposed rule should explicitly provide that attainment will only be required during the recreation season. Because the recreation season is also the time period when the public will use the water bodies for swimming, this limitation is appropriate and consistent with the goals of the proposed rule.

Commenter: NYCDEP

Response to Comment 55:

The applicability of pathogen indicator standards is set forth in existing regulation at 703.4(c).

Comment 56. Cost estimate and sampling methodology

DEC's cost estimate is based on a specified sampling methodology for measuring compliance, and any modification to that practice would impact DEC's cost analysis.

Commenter: NYCDEP

Response to Comment 56:

DEC's cost estimate is based on information provided by the City in WWFPs and LTCPs, which relied on a variety of sampling programs as well as modeling. The cost estimate will not be impacted if the sampling or modeling programs change because the DEC does not specify the sampling requirements for the City's analyses. The City has the flexibility to modify sampling programs at its discretion as long as it maintains the same level of confidence in its analytical predictions.

Comment 57: Impacts from other than CSO causes additional costs of compliance

While many of the waters subject to the proposed rule are impacted by CSOs, several of those waters are also impacted by pathogens from other sources, including illicit discharges, direct overland drainage and municipal separate storm sewers within and outside of New York City. There is no reference in the RIS to the compliance costs related to these other sources of pathogens. New York City estimates that the cost of elimination of discharges from other sources, including municipal storm sewers, would likely require billions of dollars of additional spending.

Commenter: NYCDEP

Response to Comment 57:

The Department stands by its conclusion, as articulated in the RIS for the proposed rulemaking, that the rulemaking does not impose any additional costs on New York City or regulated persons above what is currently required.

Comment 58: BEACH Act and RWQC

Extensive remarks were submitted regarding the 2000 BEACH Act, 2012 EPA RWQC, and the CWA requirements for state revision of water quality standards. States have until November 2015 to update their water quality standards, given that EPA published its RWQC in November 2012.

Commenter: Riverkeeper/NRDC (Paul Gallay and Larry Levine)

Response to Comment 58:

The BEACH Act directs coastal states to adopt and submit to EPA revised recreational water quality standards for BEACH Act waters by December 2015. States with non-BEACH Act waters are encouraged to review and to revise as appropriate their recreational water quality standards during their next triennial reviews.

(Source: EPA 2013 Stakeholder Webinar presentation slides. <http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/index.cfm>)

Comment 59: Natural or man-made conditions for Class SD waters

Class SD waters include those which, “because of natural or man-made conditions cannot meet the requirements for primary and secondary contact recreation and fish propagation.” The use of the phrase “natural or man-made conditions” contains ambiguity and could be argued to include the water pollution outcomes of a combined sewer overflow (a man-made condition) or a large, severe rainfall (a natural condition). DEC should clarify the regulation to show that these natural or man-made conditions which would preclude the assignment of a use, do not include water pollutant or pollution factors.

Commenter: Riverkeeper/NRDC (Paul Gallay and Larry Levine)

Response to Comment 59:

The Department partially agrees with this comment and proposed to repeal the phrase “for primary and secondary contact recreation” from the language about natural or man-made conditions. This change becomes effective with the adoption of this rulemaking.

Comment 60: Proposal not sufficiently protective from pathogens

As drafted, the proposal will not protect the people who go rowing/kayaking in the Gowanus Canal. These people need to be protected from pathogens in the water, and the proposal does not protect them.

Commenter: Buxbaum

Response to Comment 60:

With the adoption of this rulemaking, Class SD waters including the Gowanus Canal will be required to protect primary and secondary contact recreation and will have standards for total and fecal coliform to protect these activities.

Comment 61: Pathogens and wildlife; health of Jamaica Bay

It is not just for people, but also for the wildlife that uses the waters of New York City. The wildlife are susceptible to the infections that people are. Fecal discharge from the sewage treatment plants raise the levels of bacteria and nutrients in Jamaica Bay and contribute to the devastation of our environment and lack of resilience in the Bay.

Grasslands have been reduced to 30% in the last 10 to 15 years. If the trend is not reversed, the loss of all the grassland in Jamaica Bay is projected. It is being reversed, but especially in these times of climate change, we need the resilience of the bays, the waterways of New York City, to return the water to a natural state, which should be a primary purpose of EPA work, and all our work.

Commenter: Bake

Response to Comment 61:

The Department has no information that wildlife are adversely affected by pathogens in the water. The standards are for human health, to protect people who recreate in the water, from gastrointestinal illness. This rulemaking does not pertain to the loss or gain of grasslands in Jamaica Bay. For the Department's response regarding climate change, refer to DEC's response to Comment 42.

Comment 62: Standards should apply year-around/primary contact recreation season should be widened

Small children sample the water once a month throughout the year, except in July and August. When they fill up a bucket of water, they come into contact with that water, so in some places it may be prudent to look at year-round water quality standards and not just seasonal uses. If DEC looks at the full existing uses and analyzes how the water bodies are being used, DEC would know which water bodies warrant year round protection.

The New York Harbor Foundation, the Oyster Project, does a lot of primary contact work in restoring oysters in the Harbor. They have high school students diving in the water from the end of April through the end of November. Thus, the season for primary contact recreation use should be widened.

Assessment of existing uses can inform us whether the water body is being used seasonally or year round. Students use some waters from September to June for educational activities and to monitor water and biota.

Commenters: Molinski; SWIM Coalition; Tanikama

Response to Comment 62:

The Waste Water Treatment Plants (WWTP) in New York City disinfect their discharges year-around.

Comment 63: Green Infrastructure

This is an opportunity for New York City to establish itself as a leader in green infrastructure and to demonstrate that large cities can be responsible ecological citizens of the planet. We all understand the benefits of density, and any opportunity New York City has to take leadership in that area should be embraced.

Commenter: Atema

Response to Comment 63:

New York City is a leader in green infrastructure (GI). To date, The City has expended over \$200 million in GI projects and is planning to commit a total of \$1.5 billion in public funds and another \$900 million in provide investment to construct GI over the next 20 years. Please also see: http://www.nyc.gov/html/dep/html/stormwater/nyc_green_infrastructure_plan.shtml.

Comment 64: Delayed access to public hearing

Multiple commenters noted delays in reaching the public hearing room due to security procedures outside. Some people missed much of the hearing. Commenter had arrived an hour early.

Commenters: Coover; Gershenbaum; Kantrowitz; Molinski

Response to Comment 64:

The Department acknowledges that there appeared to be security delays in accessing the federal building in Manhattan where the March 9 public hearing was conducted, but believes that all speakers who wished to verbally comment on the record were able to do so. The public hearing was an opportunity for the public to make oral comments to the Department, rather than for the Department to provide information to the public about the proposed rule. The latter purpose was served by the Department's public information meeting held at that same location on January 6,

2015. Further, the purpose was for the public to speak to the Department and not intended to be an opportunity for members of the public to speak to other members of the public. Thus it is not relevant that some speakers were unable to hear what speakers before them had said. In addition, the written comment period was open from December 3 through March 16, a full week beyond the hearing date. The Department does not believe that anyone's ability to comment on the rule was precluded due to the security requirements at the federal building in Manhattan.

Comment 65: Clarification on new designation

It is unclear what the "new designation" means, whether there is any action on DEC's part to change the quality of the water or simply a designation to change the - - .

Commenter: Molinski

Response to Comment 65:

While it is not exactly clear to the Department what the commenter was asking, he appears to be inquiring about the proposed revision that specifies water quality must be suitable for primary contact recreation, this is addressed in DEC's response to Comment 11.

Comment 66: Toxics in fish

People are observed fishing off the dock at Flushing Bay. It is not clear whether it is for personal consumption or illegal commercial consumption, but the concern is that toxic catch is ending up on a plate somewhere.

Commenter: Craddock, K

Response to Comment 66:

Flushing Bay, as is the case with all waters of New York State, currently has standards of the Health (Fish Consumption) type, to protect the human consumers of fish. There are certain waters for which fish consumption advisories have been issued, including the East River and its tributaries. For more information refer to the New York State Department of Health's website at http://www.health.ny.gov/environmental/outdoors/fish/health_advisories/regional/new_york_city.htm

The public is urged to report suspected environmental crimes to DEC law enforcement; contact information is available on the DEC website, www.dec.ny.gov.

Comment 67: Storm water matters

Endorses the points of the storm water infrastructure matters coalition, the ongoing existing use as primary contact or recreation of these waters and support general continuing use of such.

Commenter: Coover

Response to Comment 67:

The Department appreciates this comment in support of the proposal.

Comment 68: Supports additional recreation

There should be more recreation with the support of New York City – as there are a number of people using recreational activities.

Commenter: Ringenary

Response to Comment 68:

With the adoption of this rulemaking, the quality of Class I and Class SD waters must be suitable for primary contact recreation, and standards are added to protect that activity. This may lead to increased recreational opportunities and activity.

Comment 69: Monitoring and notification

There should be better control, and monitoring to keep people who are using the water for specific recreational activities safe. People are using the water but are unaware that there is a problem; the public should be notified if there is a problem. How should the public be educated about this?

Commenter: Ringenary

Response to Comment 69:

Notification is made under New York's Sewage Pollution Right to Know Act, which requires that discharges of untreated and partially treated sewage discharges are reported by publicly owned treatment works (POTWs) and publicly owned sewer systems (POSSs) within two hours of discovery to DEC and within four hours of discovery to the public and adjoining municipalities. For more information on this, please see <http://www.dec.ny.gov/chemical/90315.html>.

Appendix A

Figure 1 (Relates to Response to Comment 7):

